Supreme Court, U. S.
FILED
SEP 13 1979
JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No. ~~79~~-450

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

YOHURA JONES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

MARIO MEROLA
District Attorney
Bronx County
215 East 161 Street
Bronx, New York 10451
Petitioner, pro se
(212) 590-2060

ALAN D. MARRUS
CARY W. SUCOFF
Assistant District Attorneys
Of Counsel

TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutory and Constitutional Provisions Involved	2
Statement of the Case	4
Reasons for Granting the Writ	7
Conclusion	12
Appendix A—Opinion of the Appellate Division, First Department	2a
Appendix B—Opinion of the New York Court of Appeals	6a

CITATIONS

Chapman v. California, 386 U.S. 18	8
Melanson v. O'Brien, 191 F.2d 963 (1st Cir.)	11
People v. Garcia, 51 A.D.2d 329 (N.Y.A.D.)	6
People v. Hagan, 24 N.Y.2d 395	7
People v. Jones, 63 A.D.2d 637	6
People v. Jones, 47 N.Y.2d 409	6, 7
Sirratt v. State, 398 S.W.2d 63 (S. Ct. Ark.)	10
State v. Lawrence, 167 N.W.2d 912 (S. Ct. Iowa)	10
State v. Padilla, 91 N.M. 800	9, 10
United States v. Cianfroni, 573 F.2d 835 (3rd Cir.)	10
United States v. Garland, 363 F.2d 487 (2d Cir.)	8
United States *ex rel.* Latimore v. Sielaff, 561 F.2d 691 (7th Cir.)	9
United States *ex rel.* Lloyd v. Vincent, 520 F.2d 1272 (2nd Cir.)	6, 8
United States v. Kobli, 172 F.2d 919 (3rd Cir.)	10
Walker v. United States, 322 F.2d 434 (C.A.D.C.)	10

IN THE

Supreme Court of the United States

October Term, 1979

No. ——

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

YOHURA JONES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

The petitioner, Mario Merola, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New York Court of Appeals entered in this proceeding on June 14, 1979.

Opinion Below

The opinions of the New York Court of Appeals, reported at 47 N.Y.2d 409; —— N.Y.S.2d —— and of the Appellate Division, First Department, reported at 63 A.D. 2d 637; 405 N.Y.S.2d 461 appear in the Appendix hereto.

Jurisdiction

The judgment of the New York Court of Appeals was entered on June 14, 1979. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Questions Presented

1. Whether the New York Court of Appeals misconstrued the Sixth Amendment right to a public trial by holding that defendant's State criminal conviction for selling narcotics is *per se* reversible where the trial court erroneously closed the courtroom during the testimony of an undercover police officer who was no longer engaged in undercover work at the time of his testimony at trial.

2. Whether the error was harmless, since the closure was based on a mistaken, but good faith belief, that the officer was still in an undercover assignment, the defense never renewed its request for a hearing or asked that the public be returned to the courtroom when the error was discovered, the testimony taken *in camera* was entirely cumulative of testimony given in public and no prejudice to the defense has been found.

Statutory and Constitutional Provisions Involved

United States Constitution: Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

United States Constitution: Fourteenth Amendment, Section One:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York State Judiciary Law: Section Four:

> The sitting of every court within this state shall be public, and every citizen may freely attend the same, except that in all proceedings and trials in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court. L.1909, c. 35; amended L.1945, c.649 § 3, eff. April 9, 1945.

New York Civil Rights Law: Section Twelve:

> In all criminal prosecutions, the accused has a right to a speedy and public trial, by an impartial jury, and is entitled to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and to have compulsory process for obtaining witnesses in his favor. An alien is not entitled to a jury, composed in part of aliens or strangers, in an action or special proceeding civil or criminal.

Statement of the Case

Yohura Jones was arrested on March 20, 1975 and charged with, *inter alia,* three counts of criminal sale of heroin. At trial in the Supreme Court of New York, Bronx County, seven witnesses testified for the prosecution. The defense presented no witnesses. The two key prosecution witnesses were Police Officers John Howard and Vincent Brown. These men were the two undercover officers who arranged and executed the unlawful sales.

Police Officer Howard was the fourth witness to testify at the trial. During the early portion of his testimony, the court inquired as to the undercover agent's desire to testify *in camera.* After some conversation with the court, the prosecutor questioned Officer Howard and reported that Howard had no reservations about testifying in public (T. 226-28).*

Officer Howard then related, in public and in great detail, the facts surrounding each of the three illegal sales for which the defendant was on trial. Howard was the fourth witness to testify publicly, and was followed by another prosecution witness who also testified in public.

When Police Officer Vincent Brown took the stand as the sixth witness in this trial, the prosecutor requested that the courtroom be sealed because the officer indicated "that he is in fear of his life" (T. 396). The prosecutor also pointed out that the courtroom in which the trial was

* Numerical references are to the Record on Appeal in the Court of Appeals.

being conducted was a narcotics part and that the people in the audience "are waiting for trial in narcotics cases" (T. 397). Based on the prosecutor's representation and the attendant circumstances the court, over defense counsel's objection, took:

> judicial notice of the fact that the very nature of the work of the undercover agent in the City of New York involved with narcotics is such to place him in jeopardy every day he is on the streets because of the high crime incidents in the areas the undercover has worked and, as a matter of fact, where this case arises from. The court is satisfied that there is a real and present danger to his safety (T. 397).

The decision to close the courtroom during Officer Brown's testimony was made under a mistaken assumption that the officer was still employed in an undercover capacity at the time of the closure. The fact of Officer Brown's reassignment to uniform duty became apparent during direct examination. However, defense counsel failed to renew his objection upon receipt of this new information. Instead, defense counsel sat quietly while Officer Brown substantially restated the account of the three criminal sales that was related earlier by Officer Howard.

On March 18, 1976, Yohura Jones was convicted of illegally selling narcotics. In his appeal to the Appellate Division, First Department, respondent argued, *inter alia,* that closing the courtroom deprived him of his right to a public trial. On May 25, 1978, the Appellate Division, First Department, rejected this assertion. The majority opinion (a memorandum opinion) stated:

> We are also of the view that exclusion of the public from the courtroom during the testimony of one of the

undercover officers was made on the basis of an inadequate record, but we do not believe that such a circumscribed exclusion seriously deprived defendant of the benefit of a public trial. (See, *United States ex rel. Lloyd* v. *Vincent,* 520 F.2d 1272, 1274; *People* v. *Garcia,* 51 A.D.2d 329, 331.) In so holding we do not intimate that the absence of prejudice is a factor in the consideration of whether there has been a constitutional deprivation. The right to a public trial stands on its own. But it is not absolute. The exclusion here was of a limited nature, involving only one witness. It was made on the mistaken but good faith assumption by the court that the officer, who was, according to the prosecutor, "in fear of his life", was still in an undercover assignment. It should be noted that the other undercover officer testified publicly.

People v. *Jones,* 63 A.D.2d 637 (1st Dept. 1978).

In a dissenting opinion, Associate Justice Leonard Sandler observed that the closure was a "palpable error" and "the question presented is whether such error requires reversal of the conviction in a case in which, as I am inclined to agree, the evidence of guilt is substantial and other trial errors would not by themselves justify reversal." *Id.* at 638.

Appellant renewed his claim before the New York Court of Appeals which, on June 14, 1979, unanimously reversed the decision of the Appellate Division and ordered a new trial. The decision, written by Associate Judge Jacob Fuchsberg, found that the "defendant's trial was improvidently closed to the public" *People* v. *Jones,* 47 N.Y.2d 409, 415, and focused on the question of whether such error was reversible. The court ruled that harmless error analysis was inappropriate since a public trial is

the "institutional safeguard for attaining [a fair trial]." *Id.* at 416. The court concluded that ". . . a per se rule of reversal irrespective of prejudice is the only realistic means to implement this important constitutional guarantee." *Id.* at 417.

Reasons for Granting the Writ

In an opinion based primarily on the federal constitutional guarantee that "an accused shall enjoy the right to a . . . public trial" (U.S. Const., 6th & 14th Amdts.), the New York Court of Appeals has ruled that although "trials in our State may be closed during the testimony of agents whose public appearance would endanger their lives or seriously damage other investigations" *People* v. *Jones, supra* at 414, where a trial is closed without an adequate showing of these fears, "a per se rule of reversal, irrespective of prejudice, is the only realistic means to implement [defendant's constitutional right to a public trial]." *Id.* at 417. This *per se* rule conflicts with at least one other decision of New York's highest court, as well as decisions of certain federal courts of appeals and other state courts. The rule also raises the vastly important concern over what effect such a constitutional violation has on an otherwise sound conviction. As this Court has never rendered a definitive ruling addressing the availability of harmless error analysis in the area of public trial, Petitioner respectfully suggests that this issue of great importance is fertile for review.

In *People* v. *Hagan,* 24 N.Y.2d 395 (1969), the New York Court of Appeals ruled that where the courtroom was

closed on the bald assertion of a witness' attorney that the witness feared for his life, defendant's right to a public trial was not violated where the proof was overwhelming and given by many witnesses. In *Hagan,* where the testimony given *in camera* was brief and cumulative of other testimony, the New York Court of Appeals, citing *Chapman* v. *California,* 386 U.S. 18 (1967), held that "[E]ven if there were error in the exclusion, it should be held beyond a reasonable doubt that it was harmless." *People* v. *Hagan, supra* at 400. As the New York Court of Appeals has in the instant case rejected any harmless error analysis with regard to violations of a defendant's right to a public trial, a clear incongruity exists in New York State law.

The Second Circuit Court of Appeals has also held that the degree of prejudice inuring to a defendant should be considered in determining the effect of an erroneous closure on the validity of a conviction. In *United States* v. *Garland,* 363 F.2d 487 (2d Cir. 1966), defendant's infant child was excluded during the rendition of supplemental instructions to the jury. The exclusion forced defendant's wife to leave the courtroom as well. The Court of Appeals stated:

> We think it improper to exclude any portion of the public, particularly a member of a defendant's family, without more reason than was shown here .... However, no objection was made at the time and we are unable to perceive that any prejudice to the appellant resulted from the exclusion.

United States v. *Garland, supra* at 489.*

* In *United States ex rel. Lloyd* v. *Vincent,* 520 F.2d 1272 (2d Cir. 1975) the Second Circuit again ruled on the propriety of a closure. Finding that the *in camera* testimony of two undercover agents was "a limited one," the court stated that "we think it highly improbable that an exclusion thus circumscribed will seriously deprive defendants of the benefits of a public trial." Implicit in this decision is a balancing between the safety of the agents and the prejudice inuring to defendants.

Explicit in both of these decisions is that even where a trial court acts improvidently in closing a courtroom, an appellate court will not, *per se,* reverse an otherwise sound conviction in the absence of some prejudice. The New York and Second Circuit opinions do not stand alone.

The Seventh Circuit Court of Appeals, in deciding on the propriety and effect of a closure, indicated that "an affirmative showing of harm is unnecessary to establish a violation of the defendant's right to a public trial." *United States ex rel. Latimore* v. *Sielaff* (7th Cir. 1977). However, that court went on to state that:

> Protection of the complaining witness from potential embarrassment does not justify any perceptible increase in the likelihood that the defendant might be convicted. The presence of this justification merely eliminates the implication as a matter of law that the defendant was prejudiced by the exclusion of spectators and leads us to the question of whether the defendant actually was prejudiced by that action.

People ex rel. Latimore v. *Sielaff, supra* at 695. That court, finding that no prejudice resulted to defendant's case as a result of the exclusion of spectators, went on to affirm the conviction.

Likewise, in *State* v. *Padilla,* 91 N.M. 800, 581 P.2d 1295 (1978), the Court of Appeals of New Mexico ruled that spectators were properly excluded from the courtroom during the testimony of a rape victim. The court stated that as the request of the victim to close the courtroom was justified, "It was up to defendant to show that he was actually prejudiced by the exclusion of disinterested persons." *Id.* at 802. The court concluded that

"[t]he record in this case does not show, and does not suggest, that defendant was prejudiced" *State* v. *Padilla, supra* at 802.

The cases cited above are not presented in an attempt to urge upon this Court the proposition that a defendant acquires a "burden of proof" with regard to establishing some prejudice derivative from an improper closure. The People recognize that a majority of federal circuit and state cases on this subject hold that no such showing is required. *See, e.g., United States* v. *Cianfroni,* 573 F.2d 835, 848 (3d Cir. 1978); *Walker* v. *United States,* 322 F.2d 434, 438 (D.C. Cir. 1963); *United States* v. *Kobli,* 172 F.2d 919 (3d Cir. 1949); *State* v. *Lawrence,* 167 N.W. 2d 912 (S. Ct. Iowa 1969); *Sirratt* v. *State,* 398 S.W.2d 63, 67 (S. Ct. Ark. 1966).

What these cases suggest, however, is that although defendant need make no showing of prejudice, the appellate court should review the record to determine if, in fact, the defendant has been prejudiced by the error. The New York Court of Appeals has rejected this responsibility and has instead—*contra* to the majority of decisions on this subject—declared a *per se* rule of reversal.

In basing its holding on the guarantee of a public trial contained in the Sixth Amendment, the New York Court of Appeals ignored the fact that this guarantee has been applied to the states through the Fourteenth Amendment's due process clause. Thus, the court circumvented the due process issue by declaring that where a courtroom is erroneously closed, that violation of the Sixth Amendment requires a *per se* reversal. The court failed to note, however, that as opposed to the prosecution of a federal offense, in which the violation of the specific guaranty of a public trial might require a reversal, this state prosecution invokes the more general guaranty of due process of law and raises a different question. *See, Melanson* v. *O'Brien,* 191 F.2d 963, 965 (1st Cir. 1951). This Court has held that where a claim

> . . . derives from the due process clause and not from one of the explicitly defined procedural safeguards of the Constitution, decision must turn on the particular circumstances of the case . . .

Levine v. *United States,* 362 U.S. 610, 616; 4 L. Ed. 2d 989, 995, 80 S. Ct. 1038 (1960). The New York Court of Appeals acted contrary to this ruling when it refused to review the circumstances of this case, other than to decide that the closure was erroneous. What petitioner here urges is that the New York Court erred when it refused to so consider the surrounding circumstances. Petitioner does not suggest that a defendant be required to make an affirmative showing of prejudice. However, there seems no reason in law or practicality that should prevent an appellate court from considering the People's showing that a defendant, as in the case at bar, suffered no harm nor practical violation of his basic rights.

Conclusion

For these reasons, a writ of certiorari should issue to review the Judgment and Opinion of the New York Court of Appeals.

Respectfully submitted,

Mario Merola
District Attorney
Bronx County
215 East 161 Street
Bronx, New York 10451
Petitioner, pro se
(212) 590-2060

Alan D. Marrus
Cary W. Sucoff
Assistant District Attorneys
Of Counsel

September 1979

APPENDIX A

OPINION OF THE APPELLATE DIVISION, FIRST DEPARTMENT

show that defendant's resistance to plaintiffs' claim was other than in good faith or proper business practice. Plaintiffs make no showing of fraudulent, criminal or dishonest acts by the insurer concerning or affecting the general public so as to warrant punitive or exemplary damages *(Walker v Sheldon,* 10 NY2d 401; *Marvex Processing & Finishing Corp. v Allendale Mut. Ins. Co.,* 91 Misc 2d 683; opn by Fein, J., affd 60 AD2d 800; see, also, *M. S. R. Assoc. v Consolidated Mut. Ins. Co.,* 58 AD2d 858). Settle order on notice. Concur—Birns, J. P., Silverman, Evans, Lane and Sandler, JJ.

17 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v YOHURA JONES, Appellant.—Judgment, Supreme Court, Bronx County, rendered March 18, 1976, convicting defendant of criminal sale of a controlled substance in the third degree (three counts) and of criminal impersonation, and sentencing him to three concurrent indeterminate terms of eight and one-third years to life, and a one-year term to run concurrently, modified, as a matter of discretion in the interest of justice, to the extent of reducing the indeterminate sentences to three years to life and, except, as thus modified, affirmed. Although we affirm the conviction we think that it was improper for the prosecutor in summation to state that the past records of the testifying police officers were matters of public record when, in fact, defense counsel was not permitted examination of these records and the District Attorney objected to such an inspection, even by the court, *in camera.* (In point of fact, the court did inspect, *in camera,* the personnel records but apparently found no evidence of misconduct.) The prosecutor also commented that the defense attorney had a right to subpoena and examine all of the officers' personnel records and that he had the opportunity to cross-examine the undercover officers as to any immoral or illegal acts which they might have committed. The effect of these comments was to convey to the jury the impression that there must have been no instances of misconduct since defense counsel would have pursued the matter had he discovered any in his examination of the records. Although there were other excesses in the prosecutor's summation, it is obvious that they were prompted by highly inflammatory statements in defendant's summation that the officers had intentionally framed him and made him a "fall-guy to cover other narcotics transactions." We are also of the view that exclusion of the public from the courtroom during the testimony of one of the undercover officers was made on the basis of an inadequate record, but we do not believe that such a circumscribed exclusion seriously deprived defendant of the benefit of a public trial. (See *United States ex rel. Lloyd v Vincent,* 520 F2d 1272, 1274; *People v Garcia,* 51 AD2d 329, 331.) In so holding we do not intimate that the absence of prejudice is a factor in the consideration of whether there has been a constitutional deprivation. The right to a public trial stands on its own. But it is not absolute. The exclusion here was of a limited nature, involving only one witness. It was made on the mistaken but good faith assumption by the court that the officer, who was, according to the prosecutor, "in fear of his life", was still in an undercover assignment. Moreover, we think it is significant that defense counsel never renewed his request for a hearing or asked that the public be returned to the courtroom once the fact was disclosed that the undercover officer had been transferred to a uniformed assignment. This disclosure came in the first few questions put to the officer. In short, defense counsel, having made his *pro forma* objection for the appellate record, was content to let the matter rest. It should be noted that the other undercover officer testified publicly. Finally, under the circumstances, the imposition of a sentence of eight and one-third years to life for three sales of relatively small quantities of narcotics for a total sum

of $142 was excessive. As an exercise of discretion in the interest of justice we therefore modify the sentence to three years to life. Concur—Kupferman, J. P., Silverman, Fein and Sullivan, JJ.; Sandler, J., dissents in a memorandum as follows: In my opinion, the closing of the courtroom during the testimony of one of the two undercover officers in this narcotics case under the circumstances revealed violated the defendant's right to a public trial under the Sixth Amendment to the Constitution of the United States and requires that the conviction be reversed. Just prior to the testimony of Officer Brown, one of the two narcotic undercover officers whose testimony was central to the prosecution of this case, the Assistant District Attorney requested that the courtroom be closed during his testimony because the officer was in "fear of his life." The defense counsel objected and requested a hearing. The court took judicial notice that the "nature of the work of the undercover agent in the City of New York involved with narcotics is such to place him in jeopardy every day he is on the streets", denied a hearing on the issue, and closed the courtroom. It developed during the testimony of Officer Brown that he was no longer an undercover officer, that he was then a uniformed officer and had been one for some six months prior to his testifying, and that he was assigned to a precinct distant from the area in which the alleged crime had occurred. That the closing of the courtroom under these circumstances was an abuse of discretion in violation of the defendant's constitutional right to a public trial seems to me obvious. (See *People v Hinton,* 31 NY2d 71; *People v Morales,* 53 AD2d 517; *People v Richards,* 48 AD2d 792.) I know of no authority that comes close to supporting as an appropriate exercise of discretion the judicial action that was here taken. It may well be that if a hearing had been held, facts might have been developed that would have justified the action that was taken. On this record, the closing of the courtroom was a palpable error. The question presented is whether such error requires reversal of the conviction in a case in which, as I am inclined to agree, the evidence of guilt is substantial and other trial errors would not by themselves justify reversal. This particular issue appears never to have been squarely decided by an appellate court. It is true that in *People v Richards (supra),* the exclusion of the public during the testimony of an undercover officer was described as "reversible error" even though it was established that the officer was still engaged in an undercover capacity in the same "general area." However, the opinion, after describing other trial errors, closes with the comment that (p 793): "in view of the closeness of the case, a right sense of justice dictates that a retrial should be granted." The two principal cases in the general area of our concern seem to me to be *People v Hinton (supra)* and *United States ex rel. Lloyd v Vincent* (520 F2d 1272, cert den 423 US 937). Neither discuss the legal consequences that would follow a ruling that a courtroom had been closed unjustifiably during the testimony of a witness. Nevertheless, the opinions in both cases, and particularly that of the United States Court of Appeals in *United States ex rel. Lloyd v Vincent (supra),* seem to me to support at least by implication the view that a reversal must follow. In both cases it was held that the defendant's claim to a public trial was subject to the discretionary power of the trial court under appropriate circumstances, and that the closing of the courtroom during the testimony of an undercover narcotics officer, still engaged in that kind of work, was an appropriate exercise of discretion. In *Hinton,* the court emphasized that the discretion should be "sparingly exercised and then, only when unusual circumstances necessitate it" (31 NY2d 71, 76, *supra).* And, in *Lloyd,* the court expressed its strong preference for an evidentiary hearing prior to any such determi-

nation, and stressed the fact that the trial court had given the defendant and his counsel an opportunity to indicate any particular person they wished to have present in the court. What seems to me of present interest is that in neither opinion is there any intimation that if it had been concluded that judicial discretion had been improvidently exercised, the conviction might nonetheless have been sustained on the view that the case was a strong one, or that the error was not prejudicial. The implication that an unjustifiable closing of the courtroom would require a conviction to be vacated without regard to other error or the strength of the case seems to me inherent in both opinions and particularly in that of the court in the *Lloyd* case, although this inference, it must be acknowledged, is open to reasonable disagreement. The legal problem presented has some special aspects. It would be an unusual case in which the closing of the courtroom during the testimony of a witness would be likely to have any impact whatever upon the outcome of the trial. The constitutional guarantee of a public trial was clearly designed to serve broad purposes in addition to protecting the rights of an individual defendant. The constitutional safeguard cannot be effectively enforced if appellate review of discretion in this area is limited by the requirement that there be a finding of actual prejudice to the defendant or that there be other trial errors that would independently mandate reversal. Although judicial reluctance to reverse convictions for reasons unrelated to the guilt of the defendant is understandable, the standard implicit in the opinion of the court opens the way, in my opinion, to a disturbing erosion of an important constitutional right. Accordingly, the judgment of conviction should be reversed and the case remanded for a new trial.

18 NINA ALTMAN, Respondent, v JOHN B. M. PLACE et al., Appellants, et al., Defendants.—Orders, Supreme Court, New York County, entered January 18, 1978, denying defendants' motions to dismiss the complaint for failure to state a cause of action and failure to comply with the requirements of subdivision (c) of section 626 of the Business Corporation Law, are modified, on the law, to the extent that the motion of defendant IU International Corporation pursuant to CPLR 3211 (subd [a], par 7) to dismiss the complaint as against said defendant for failure to state a cause of action is granted and the complaint is dismissed as against said defendant, without prejudice to an application by plaintiff to Special Term, within 20 days after service of a copy of the order to be entered hereon, with notice of entry, for leave to replead pursuant to CPLR 3211 (subd [e]), and the orders are otherwise affirmed, without costs and without disbursements. There is no showing of any breach by defendant IU International Corp. of any duty owed to the plaintiff, a stockholder of the Anaconda Company, or to Anaconda, in connection with the sale by IU International Corp. of one of its subsidiaries to Anaconda at an allegedly grossly excessive price. We think, however, that for purposes of pleading, the complaint sufficiently alleges as against the directors and officers of Anaconda that they entered into the transaction not in the exercise of business judgment but for the purpose of benefiting themselves personally and that it would be futile to demand that such directors and officers bring this suit. The fact that, over a year after the suit was instituted, the directors changed, did not require plaintiff to serve a new demand. All concur except Fein and Sandler, JJ., who dissent in part and would affirm the orders *in toto* including the denial of the motion to dismiss by IU International, and Lane and Yesawich, JJ., who dissent in part and would reverse the orders appealed from, on the law, *in toto* and grant the motions to dismiss by all defendants for the reason

APPENDIX B

OPINION OF THE NEW YORK COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, v YOHURA JONES, Appellant.

Argued April 27, 1979; decided June 14, 1979

SUMMARY

APPEAL, by permission of a Justice of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of that court, entered May 25, 1978, which modified, as a matter of discretion in the interest of justice, and, as modified, affirmed a judgment of the Supreme Court (WILLIAM J. DROHAN, J.), rendered in Bronx County upon a verdict convicting defendant of criminal sale of a controlled substance in the third degree (three counts) and criminal impersonation. The modification consisted of reducing the indeterminate sentences imposed.

The Supreme Court, over defendant's protest, summarily granted the prosecuting attorney's request that the court be closed to the public during the testimony of a witness alleged to be an undercover police officer, taking judicial notice that the nature of the work of an undercover agent in New York City involved with narcotics places him in jeopardy. The Appellate Division affirmed the conviction, concluding that this episode had not seriously deprived defendant of the benefit of a public trial.

The Court of Appeals reversed the order of the Appellate Division and ordered a new trial, holding, in an opinion by Judge FUCHSBERG, that it is error to close a trial to the public without a factual showing that defendant's right to a public trial is not being sacrificed for less than compelling reasons, and such error is reversible per se, requiring no showing of prejudice.

People v Jones, 63 AD2d 637, reversed.

HEADNOTES

Crimes — Right to Public Trial

1. While a trial court is not without discretion to choose among alternative means for determining whether an application to close a courtroom is meritorious, no closing can be tolerated that is not preceded by a careful inquiry to assure the court that the defendant's right to a public trial is not being sacrificed for less than compelling reasons, requiring a factual showing that an exception to the norm of a public trial is justified. Although trials in this State may be closed during the testimony of undercover agents whose public appearance would endanger their lives or seriously damage other investigations, absent real jeopardy, such an agent's appearance on

the stand without more, would not sanction an exclusion order; nor would the termination of his undercover work necessarily preclude the court from granting the request to close; it should make the Judge realize all the more that the prosecutor has to establish that the danger to the witness is still present. Accordingly, defendant's right to a public trial was abridged when the Trial Judge, over defendant's protest, summarily granted the prosecuting attorney's application to close the courtroom to the public during the testimony of a witness alleged to be an undercover police officer, merely taking "judicial notice" of the dangerous nature of the work of an undercover agent involved in a narcotics investigation in New York City.

Crimes — Right to Public Trial

2. While the right to a public trial is neither inflexible nor absolute, the discretion to limit the public nature of judicial proceedings must be sparingly exercised and then only when unusual circumstances necessitate it, balancing the defendant's paramount rights, the need to preserve order in the courtroom while disposing of cases expeditiously, and the likelihood that any particular measure adopted will significantly foster full and truthful testimony.

Crimes — Right to Public Trial

3. Where a trial is improvidently closed to the public without a factual showing that defendant's right to a public trial is not being sacrificed for less than compelling reasons, such error is reversible per se, requiring no showing of prejudice. Although such a rule can result in reversal of a conviction of one clearly proved guilty, it is the only realistic means to implement the constitutional guarantee that an accused shall enjoy the right to a public trial (US Const, 6th & 14th Amdts; Civil Rights Law, § 12; Judiciary Law, § 4), a significant safeguard against unfair trials, as well as protecting the overriding interest of the public at large with the values thus fostered. Moreover, to require the defendant to undertake the well-nigh impossible task of proving prejudice would render the right to a public trial illusory and beyond appellate review on that basis.

Crimes — Fair Trial

4. The right to a fair trial is impervious to harmless error analysis.

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES*

CLS, Civil Rights Law § 12; CLS, Judiciary Law § 4
21 Am Jur 2d, Criminal Law §§ 266, 269; 75 Am Jur 2d, Trial § 33
23 Am Jur Pl & Pr Forms (Rev), Trial, Form 61

ANNOTATION REFERENCE

Exclusion of public during criminal trial. 48 ALR2d 1436.

* By the Publisher's Editorial Staff.

POINTS OF COUNSEL

Edward S. Kornreich and *William E. Hellerstein* for appellant. Appellant was denied his Sixth and Fourteenth Amendment rights to a public trial by the closing of the courtroom to spectators, over defense objection, during the testimony of an exundercover officer, who had been on uniformed patrol for six months in a precinct distant from that of the alleged sales, without any hearing as to the potential hazards of public testimony. *(Matter of Gannett Co. v De Pasquale,* 43 NY2d 370; *People v Hinton,* 31 NY2d 71; *Tanksley v United States,* 145 F2d 58; *United States ex rel. Lloyd v Vincent,* 520 F2d 1272; *People v Boyd,* 59 AD2d 558; *Butler v Smith,* 416 F Supp 1151; *United States v Clark,* 475 F2d 240; *United States ex rel. Bennett v Rundle,* 419 F2d 599; *People v Jelke,* 308 NY 56.)

Mario Merola, District Attorney (Cary Sucoff and *Steven R. Kartagener* of counsel), for respondent. I. Appellant's guilt was established beyond a reasonable doubt by overwhelming evidence. II. The trial court properly exercised its discretion, and appellant was not deprived of his right to a public trial when the courtroom was closed during the testimony of former undercover Police Officer Vincent Brown after that officer had indicated to the prosecutor that he feared for his life. *(Matter of Oliver,* 333 US 257; *People v Jelke,* 308 NY 56; *People v Hinton,* 31 NY2d 71; *Matter of Gannett Co. v De Pasquale,* 43 NY2d 370; *People v Garcia,* 51 AD2d 329; *United States ex rel. Lloyd v Vincent,* 520 F2d 1272; *People v Castro,* 63 AD2d 891.)

OPINION OF THE COURT

FUCHSBERG, J.

This appeal centers on the constitutional guarantee that an "accused shall enjoy the right to a * * * public trial" (US Const, 6th & 14th Amdts; see, also, Civil Rights Law, § 12; Judiciary Law, § 4).[1]

Specifically, the issues presented for our determination are

1. Although the Sixth Amendment is applicable in State trials by virtue of the due process clause of the Constitution *(Duncan v Louisiana,* 391 US 145; *Estes v Texas,* 381 US 532; *Matter of Oliver,* 333 US 257), most State Constitutions contain identical guarantees (see Note, 41 NYU L Rev 1138, 1140, nn 11-15). New York is among a small minority of States with no specific constitutional provision, but this oversight is compensated by the forthright language of section 12 of the Civil Rights Law ("In all criminal prosecutions, the accused has a right to a * * * public trial") and section 4

(1) whether the defendant's right to a public trial was abridged when the Trial Judge without further inquiry acceded to the prosecuting attorney's request that the court be closed to the public during the testimony of a witness alleged to be an undercover police officer and (2), if it was, whether the defendant's conviction is reversible on that ground in the absence of a showing of prejudice.

Defendant was convicted of charges arising out of the sale of heroin to two undercover police officers, Brown and Howard, who were the primary witnesses at his trial. Of the two, Howard was the first to take the stand. Midst his testimony, the Trial Judge turned to the prosecutor and, *sua sponte,* asked whether the courtroom should be closed to the public "because you have an undercover". The Assistant District Attorney first responded that he had anticipated rejection of such an application because it would "den[y] the defendant's right to a public trial", but then went on to assert that Howard was frightened and desired the courtroom closed to spectators. However, before there was a ruling on defense counsel's objection, Howard, though then still assigned to undercover activity, disclaimed any apprehension about testifying in open court, whereupon the issue was dropped.

Next day, as Brown was about to be called, the prosecutor, now needing no prompting, again applied for closure on his representation that the witness "is in fear of his life". Over defendant's protest that no hearing to establish a compelling need for that step had been held, the Judge, without requesting or receiving an iota of supporting information either by way of testimony or colloquy, granted the application summarily. In doing so, he merely announced that he was taking "judicial notice" that "the very nature of the work of the undercover agent in the City of New York involved with narcotics is such as to place him in jeopardy every day he is on the streets because of the high crime incidence in the areas the undercover has worked and, as a matter of fact, where

---

of the Judiciary Law ("The sittings of every court within this state shall be public, and every citizen may freely attend the same, except that in all proceedings and trial in cases for divorce, seduction, abortion, rape, assault with intent to commit rape, sodomy, bastardy or filiation, the court may, in its discretion, exclude therefrom all persons who are not directly interested therein, excepting jurors, witnesses, and officers of the court"). The exceptions listed in the Judiciary Law were narrowly limited in *People v Jelke* (308 NY 56) and would not, in any event, supersede a defendant's constitutional rights.

this case arises from. The court is satisfied that there is a real and present danger to his safety".

The courtroom having been cleared, it was not long before a picture completely at odds with the one portrayed by the prosecutor was unveiled. For Brown himself testified that he no longer was engaged in undercover activity, that indeed he had already been serving in his new assignment as a uniformed patrolman for the last six months, and that his beat was distant from his former theatre of operations. Specifically, he made clear that he was not involved in any ongoing narcotics investigations, whether by way of carry-over from his previous work or otherwise. Even then, the court did not rescind its order.

[1] On its review of the judgment of conviction, the Appellate Division (over Justice SANDLER's dissent) concluded that this episode had not "seriously deprived defendant of the benefit of a public trial". For the reasons which follow, our view is to the contrary.

[2] At the outset, we observe that the public trial right, the foundations of which are too well catalogued elsewhere to require recapitulation here (see *People v Jelke,* 308 NY 56, 61-64; *Matter of Oliver,* 333 US 257, 266-271; Radin, Right to a Public Trial, 6 Temple LQ 381), is neither absolute nor inflexible. But we also note that, though this leaves courts with some leeway in its enforcement, since the concept of a secret trial is anathema to the social and political philosophy which motivates our society, the discretion to limit the public nature of judicial proceedings is to be "sparingly exercised and then, only when unusual circumstances necessitate it" *(People v Hinton,* 31 NY2d 71, 76).

This caution recognizes that the fundamental and constitutional nature of the right does not permit the making of an uncharted, ungrounded or unjustified exception. Rather, common sense and the more specific principles articulated in prior decisions serve as guides in balancing the defendant's paramount rights, the need to preserve order in the courtroom while disposing of cases expeditiously, and the likelihood that any particular measure adopted will significantly foster full and truthful testimony (see, generally, Bowers, Judicial Discretion of Trial Courts, § 262, pp 296-297; *United States ex rel. Bruno v Herold,* 408 F2d 125; *People v Byrnes,* 84 Cal App 2d 72, cert den 335 US 847).

[1] These considerations in mind, we address the more

immediate question—the practical operation of the guarantee in circumstances where those engaged in undercover work on behalf of law enforcement authorities are called upon to give evidence. In this connection, our decision in *People v Hinton* (31 NY2d 71, *supra)* left no doubt that trials in our State may be closed during the testimony of agents whose public appearance would endanger their lives or seriously damage other investigations. However, we never suggested that, absent real jeopardy, such an agent's appearance on the stand, without more, would sanction an exclusion order. Nor did we there have occasion to consider the methodology by which a court was to go about the business of determining whether the facts underlying the application fell within the standards enunciated in the cases.

However, a trial court would not appear to be without discretion to choose among alternative means for determining whether an application to close a courtroom is meritorious (cf. *People v Jelke,* 308 NY 56, 63, *supra).*

For instance, there are times when careful inquiry directed at counsel, the witness, or even the spectators present in the courtroom might be enough (see *United States ex rel. Smallwood v La Valle,* 377 F Supp 1148, 1153). Had the Judge here employed this technique prior to closing, he presumably would have ascertained that the prosecutor had not questioned Brown on the subject for a long time and that the information contained in the District Attorney's file on this score was stale. No doubt, this would have led him to discover that Brown was no longer engaged in narcotics assignments but was now serving in a capacity in which he literally paraded his identity as a policeman. Though the termination of his undercover work would not necessarily have precluded the court from granting the request to close, it should have made the Judge realize all the more that the prosecutor had to establish that the danger to the witness was still present.

In other cases, the only trustworthy means of establishing grounds for excluding the public may very well be to hold an evidentiary hearing (see *United States ex rel. Lloyd v Vincent,* 520 F2d 1272, 1275), which, if the need is apparent, might be held behind closed doors (cf. *People v Goggins,* 34 NY2d 163). In short, while there is no single rule to cover every case, no closing can be tolerated that is not preceded by an inquiry careful enough to assure the court that the defendant's right

to a public trial is not being sacrificed for less than compelling reasons.

As indicated, in the present case, the course adopted by the trial court in response to the all but invited conclusory motion of the prosecutor was not reasonably directed to the ascertainment of whether public testimony by Brown would threaten his safety or the integrity of any other case. There should have been a factual showing that an exception to the norm of a public trial was justified (see *People v Castro,* 63 AD2d 891; *People v Boyd,* 59 AD2d 558). Instead, the court was content to rely on its own unparticularized impressions of the vicissitudes of undercover narcotics work in general. That undercover work at times entails serious threats to the safety of agents was by no means sufficient to connect that threat to this witness. And, the court apparently treated the issue with so little appreciation of its place in the hierarchy of constitutional rights that, even when it became apparent, as it did practically at the beginning of Brown's testimony, that the information upon which the Judge had acted had been totally misleading, the closure was permitted to continue until sometime after the witness had departed.

[3] Our conclusion that defendant's trial was improvidently closed to the public brings us to the question whether such error is reversible. In contending that it is not, the People rely on the harmless error rule. And it is true that defendant points neither to discrepancies in the testimony of Officer Brown vis-à-vis that of Howard, nor to any exculpatory evidence or other benefit that might have come to him had the entire trial been public. But, in our view, prejudice need not be demonstrated.

This was recognized in *People v Jelke* (308 NY 56, 67-68, *supra),* where Judge (later Chief Judge) FULD wrote, "To the plaint that such a ruling will result in reversal of a conviction of one clearly proved guilty, it is sufficient to say that the decision herein far transcends the issue of [defendant's] guilt or the disposition of this particular case. As one court has expressed it *(People v. Murray, supra,* 89 Mich. 276, 286), 'It is for the protection of all persons accused of crime—the innocently accused, that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial.' "

[4] The continued viability of this pronouncement appeared for a time to have been undermined by *People v Hagan* (24

NY2d 395, 400), in which, though only as an alternative *ratio decidendi,* the court held that "[e]ven if there were error in the exclusion [of the public from defendant's trial], it should be held beyond a reasonable doubt that it was harmless *(Chapman v. California,* 386 U. S. 18)." On the other hand, resuscitation came when we adopted the *Chapman* harmless constitutional error rule in *People v Crimmins* (36 NY2d 230). There, while not expressly treating with public trial, we left no doubt that the right to a fair trial was impervious to harmless error analysis (36 NY2d, at pp 237-238; see, also, *People v Williams,* 46 NY2d 1070; *People v Savvides,* 1 NY2d 554).

[3] Public trial and fair trial are not strangers. Hindering concealment of abuses of the judicial process is a significant safeguard against unfair trials. Chief Justice EARL WARREN regarded the open courtroom a part of " 'the fundamental conception' of a fair *trial" (Estes v Texas,* 381 US 532, 560) and Justice JOHN M. HARLAN spoke of it as the "institutional safeguard for attaining [a fair trial]" *(Estes v Texas, supra,* at p 588).

Moreover, as suggested by the foregoing comments, though the Sixth Amendment speaks of the right as that of the "accused", it is well recognized that the public at large has an overriding concern with the values thus fostered (see, e.g., *Matter of Oliver v Postel,* 30 NY2d 171; *Nebraska Press Assn. v Stuart,* 427 US 539; Judiciary Law, § 4; Comment, The Right to Attend Criminal Hearings, 78 Col L Rev 1308, 1310-1311).[2] For example, public confidence in the administration of justice is enhanced when its doors are open to all, litigants and nonlitigants alike, and wide understanding of its methods moves in the same direction (6 Wigmore, Evidence [Chadbourn rev, 1976], § 1834; Note, 41 NYU L Rev 1138, 1139). The harmless error rule is no way to gauge the great, though intangible, societal loss that flows from the frustration of such a goal.

The practical impossibility of demonstrating prejudice faces

---

2. The right to a public trial is a protagonist in the fair trial/free press controversy, where it is asserted in opposition to the defendant's claim of prejudice from publicity (see *Matter of Gannett Co. v De Pasquale,* 43 NY2d 370, affd — US — [July 2, 1979]; *Matter of United Press Assns. v Valente,* 308 NY 71, see, generally, Dorsen, Bender & Neuborne, Political and Civil Rights in the United States [4th ed], pp 493-512; ABA Advisory Committee on Fair Trial and Free Press, Standards Relating to Fair Trial and Free Press [TD, 1966]).

an accused as well. Conceptually, a member of the public witnessing a trial may discover that he possesses material information which he will then volunteer to the parties. Or, the presence of the public may have a salutary influence in deterring a witness from perjuring himself in ways that would have been difficult for the defense to counteract. To require the defendant to undertake the well-nigh impossible task of proving prejudice would render the right to a public trial illusory and beyond appellate review on that basis (*State v Schmit,* 273 Minn 78; *Davis v United States,* 247 F 394; *State v Haskins,* 38 NJ Super 250; see, generally, Note, 41 NYU L Rev 1138, 1149; Note, 20 Stanford L Rev 83, 89; cf. *People v Felder,* 47 NY2d 287).

As a consequence, some courts have found it more comfortable to simply say that a violation of such a fundamental right implies prejudice (*People v Byrnes,* 84 Cal App 2d 72; *Tanksley v United States,* 145 F2d 58; *State v Keller,* 52 Mont 205; see, also, *United States ex rel. Bennett v Rundle,* 419 F2d 599; *United States v Kobli,* 172 F2d 919).

For all these reasons, we today make explicit what in *Crimmins* was implicit and reaffirm the holding in *Jelke* that a per se rule of reversal irrespective of prejudice is the only realistic means to implement this important constitutional guarantee. Therefore, the order appealed from should be reversed and a new trial ordered.

Chief Judge COOKE and Judges JASEN, GABRIELLI, JONES and WACHTLER concur with Judge FUCHSBERG.

Order reversed, etc.